No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT INVESTIGATING COMMITTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner United States District Judge Alcee L. Hastings submits that the respondent Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee") has mischaracterized the Questions Presented in the Petition for Writ of Certiorari (the

"Petition") and the contentions made in and necessarily decided by the courts below. As a result, the Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief") fails to address adequately the true issues this case raises or the underlying reasons why this Court should grant the writ. Moveover, the Brief employs those mischaracterizations in a manner calculated to mislead the Court.

1. The decision ordering disclosure of all the records of a grand jury for use in a civil administrative investigation is unprecedented in the decisions of this or any inferior federal court and presents a clear conflict with the principles that this Court has applied in each of the grand jury disclosure cases it has decided.

a. In the courts below, the Committee sought (App. 110-16) and obtained (App. 99-100) unprecedented access to

grand jury materials. A district judge unfamiliar with the grand jury's proceedings and records or with the Committee's investigation affirmatively declined to examine either and ordered the custodian of those records to "procure and disclose to the Special Committee all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ(MIA)" (App. 99-100). The only restrictions imposed upon the Committee's access went to the time, manner, and place at which the disclosure was to be made and copies taken (App. 99-105). Both courts recognized that they were dealing with a case of first impression and vital importance to the federal judiciary (App. 1-98, 108-09).[1]

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1. Against that background, it is significant that counsel for the judges seeking access to the grand jury material found it necessary to file a forty-eight (48) page brief to persuade this Court that the case was not worthy of review while the Solicitor General as counsel for the custodians of the grand jury records [Footnote continued.]

b. In its Brief, the Committee simply argues the merits of its position that the special nature of its statutory mandate and the status of its members as federal judges override the principles established to protect the integrity of the grand jury and require that a special exception be created for judicial investigations (Brief at 19-35). The fact that these arguments prevailed in the court of appeals or that they might ultimately persuade this Court does not undercut the importance of the Questions Presented or the need for review by this Court; it only emphasizes them.

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1. (Continued)
of all federal district courts declined to advise the Court of the Executive Branch's views on the Questions Presented. That anomaly simply reinforces the conclusion that review by the only Court whose members cannot be affected by the outcome is necessary and appropriate.

The decision below is unprecedented in the truest sense of that word. No party to this case has identified here or in the courts below any decision of any federal court that has ordered or approved either (a) disclosure of all records of an entire grand jury proceeding for use in non-criminal proceedings, or (b) disclosure of any grand jury records for non-criminal use in which the judge or judges ordering disclosure had not independently determined that disclosure of the specific materials was necessary. The decisions below ordered and approved both.

The lack of precedent to support the court of appeals decision is not an accident. The decision below conflicts with the decisional jurisprudence this Court articulated and applied in each its decisions in civil grand jury disclosure cases. See Petition at 25-33.

c. The Committee's contention that petitioner's argument on the merits was limited in the courts below or would be limited in this Court to an argument "that Rule 6(e) provides the exclusive framework for disclosure of grand jury materials" (Brief at 11; see also id. at 22) constitutes a further mischaracterization of the record below.

The district court initially ruled that the Committee's petition was subject to the requirements of Rule 6(e)(3)(C)(i),[2] and petitioner's opening briefs were based upon that ruling.[3] The subsequently

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2. Order for Briefing, In re Petition to Inspect and Copy Grand Jury Materials, No. 81-1-GJ (MIA) (S.D. Fla. filed Aug. 11, 1983)(Atkins, Sr. J.). Because a special panel was designated to hear the appeal, the paginated record was not circulated to counsel. For that reason, citations to the record below identify documents by party, document title, and date.

3. Hastings, Memorandum in Support of Motion to Dismiss or for Judgment on the [Footnote Continued]

designated judge invited the parties to resubmit comprehensive briefs in order that he "might be fully advised of your contentions as to the facts and the law."[4] In response to that invitation, the Committee renewed its argument that the district court had and should exercise inherent authority to order the requested disclosure.[5] Thereafter, Judge Hastings fully developed the arguments showing that

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3. (Continued)
Pleadings and in Response to Motion to Confirm Status and for Briefing (filed Aug. 22, 1983) and United States District Judge Alcee L. Hastings's Memorandum in Response to Court's Letter Order Dated September 23, 1983 ["Hastings Mem. (S.D. Fla.)"] (filed Oct. 14, 1983), In re Petition (S.D. Fla.).

4. Letter Order, In re Petition (S.D. Fla., dated Sept. 23, 1983) (Gordon, Sr. J., by designation).

5. Memorandum of the Investigating Committee of the Judicial Council of the Eleventh Circuit in Support of Its Petition to Inspect and Copy Grand Jury Materials ["Committee Mem. (S.D. Fla.)"] In re Petition (S.D. Fla. dated Oct. 13, 1983).

the inferior federal courts had never approved an exercise of inherent authority to order disclosure of the entire record of a grand jury investigation or, indeed, to order disclosure of any grand jury material that had not been independently examined by the court approving disclosure.[6]

2. The decisions below clearly and necessarily create a potential for grand jury misuse that would be difficult to detect and impossible to prove and that is properly raised by the record below.

Contrary to the Committee's assertions (Brief at i-ii, 35-36), the second Question Presented in the Petition does not raise an issue of grand jury misuse in

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6. Judge Hastings's Reply ["Hastings Reply (S.D. Fla.)"], 1-17, In re Petition (S.D. Fla., dated Oct. 24, 1983); Brief for Appellant: The Honorable Alcee L. Hastings ["Appellant's Brief (11th Cir.)"], e.g., at 28-32, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir. dated Feb. 27, 1984).

fact; it poses the issue of potential grand jury misuse. That question was argued in and necessarily decided by the courts below and is properly raised here.

a. This Court most recently identified and discussed the distinction in United States v. Sells Engineering, Inc., 103 S.Ct. 3133.

> . . . [B]ecause the government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se.*** Our concern is based less on any

> belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. Moreover, as the legislative history . . . shows, our concern over possible misappropriation of the grand jury itself was shared by Congress when it enacted the present version of Rule 6(e). Such a potential for misuse should not be allowed absent a clear mandate in the law.

Id. at 3142; citations omitted. The case before this Court presents the same potential for misuse; only the types of governmental actors are different.

b. Throughout the proceedings in the courts below, the Committee recognized the issue and addressed it, arguing that the status of the Committee's members as article III judges made the concern inapplicable to them.[7] Throughout the

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7. See, e.g., Committee Mem. (S.D. Fla.), supra n.5, at 12-15; Brief of Petitioner-Appellee Investigating Committee of the Judicial Council of the Eleventh Circuit at 1-2, 25, 31-32, In re Petition (11th Cir.).

proceedings in the courts below, the prosecuting attorneys representing the Justice Department in its custodial capacity agreed with the Committee, and argued that the Act ought to be construed to facilitate the transmission of the products of grand jury investigations into allegations of misconduct by a federal judge to the appropriate judicial council.[8] Throughout the proceedings in the courts below, Judge Hastings relied upon this Court's analysis and argued that the potential for abuse identified and discussed in Sells was present here.[9] The courts below made their decisions with these contentions before them.

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8. See Petition 12-13, nn.3-5 (for appropriate citations to the record below).

9. See, e.g., Judge Hastings's Reply (S.D. Fla.), supra n.6; Appellants Brief (11th Cir.), supra n.6, at 15-32; Reply Brief for Appellant: The Honorable Alcee L. Hastings, In re Petition (11th Cir. dated Mar. 16, 1984).

c. With these contentions before them, the courts below decided that if a special committee shows that the conduct of a federal judge that it is investigating in administrative proceedings has a close nexus to conduct already investigated by a federal grand jury, then the district court may (and presumably must) order disclosure of all the grand jury materials (i) without any prior or independent examination of the materials to be disclosed or inquiry into the administrative investigation being conducted and (ii) without affording the object of both investigations any opportunity to challenge the special committee's motives in seeking the material. That decision raises the second Question Presented clearly, fairly, and unavoidably, and respondents should not now be heard to suggest otherwise.

3. Throughout the proceedings below, petitioner argued that the courts should apply the doctrine of constitutional avoidance in construing the Act; the record and the decision of the court of appeals raise the third Question Presented.

a. The Committee's Brief is totally accurate in one claim: All parties and both courts below agreed that the constitutionality of the Act itself had not been challenged in this case and was not before the courts for decision (Brief at 41-42). The Committee is totally inaccurate in another (Brief at i-ii, 40-41): Petitioner did argue in the courts below, and properly raises here, the question whether the doctrine of constitutional avoidance requires that the Act be construed in a manner that would require that the Committee's petition be dismissed or denied.[10]

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10. See, e.g., Hastings Mem. (S.D. Fla.), supra n.5, at 32-37; Brief of Appellant (11th Cir.), supra n.6, at 32-55. The question as posed for the court of appeals was:
[Footnote continued]

That is the third Question Presented, and that question is fairly raised on the record.

b. The doctrine of constitutional avoidance in the decisions of this Court has an ancient lineage [see, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821)]; a classic formulation [Ashwander v. TVA, 297 U.S. 288, 346-48 (1935) (Brandeis, J., dissenting)]; and contemporary application [see, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)]. Petitioner clearly invoked that doctrine in the courts below. The Commit-

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10. [Continued]
Did the district court err in failing to recognize, and to construe the Act to minimize, the potential conflict between the Act and the provisions of the Constitution designed to keep separate the powers of government and to guarantee the independence of each federal judge?

Appellant's Brief (11th Cir.), supra n.6, at 2.

tee's attempt to mischaracterize the issue (Brief at i-ii, 40-41) is disingenuous at best.[11]

4. The arguments advanced and the characterizations made by the Committee in its Brief further evidence the need for this Court to review and resolve a dispute that has pitted federal judge against federal judge before federal judge and that concerns the powers and privilege of all federal judges other than the Justices of this Court.

a. In its Brief, the Committee confuses the distinction between reasons why this Court should grant review and arguments going to the merits of how the Court should decide the issues once review

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11. Indeed the Committee relied upon petitioner's formulation of the question in the court of appeals in attempting to persuade the district court in Hastings v. Judicial Conference, No. 83-32850 (D.D.C.) that the decisions of the courts below in this case affected the claims petitioner asserted there. Petitioner submits that more than mere disingenuity is afoot here. See, e.g., Reply to Plaintiff's Opposition to Defendants Motion for Judgment on the Pleadings at 19, Hastings v. Judicial Conference, No. 38-3850 (D.D.C.).

has been granted (Brief at 43-48). In the courts below, petitioner argued the merits below claiming in sum:

> The manner in which the Act is construed and implemented might, nay will, affect the interests of every district and circuit judge. For some, it may present a threat; for others, it may create enhanced powers. But for each, it will have an effect upon the rights he or she holds incident to the judicial office. Here, for example, this appeal asks this court to determine whether and under what circumstances a special committee investigating a federal judge may have access to the records of a grand jury. The judges who decide that question will be deciding how the Act would apply to himself as well as to Judge Hastings. More importantly, the judges of the panel here are being asked to decide in a judicial capacity what administrative powers they hold as members of a circuit judicial council. Thus, unless the doctrine of necessity applies ([United States v.] Will, 449 U.S. 200, 217 [1980]), 28 U.S.C. § 455 [1982] mandates that the federal courts decline jurisdiction.

and reasoned from that simple predicate that:

> Clearly the doctrine of necessity did not apply because the statute could and should have been construed to deny subject matter jurisdiction and make a decision on the merits unnecessary. The district court should have so construed the Act on this ground alone.

Brief of Appellant: The Honorable Alcee L. Hastings at 54-55, In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984).

In the Petition the predicate was the same: the fact that the decision below was made in a controversy between federal judges before federal judges concerning the application of the Act to federal judges created a disqualifying interest for the federal judges before whom the case came (Petition at 41). The doctrine of necessity compelled the judges of those courts to rule upon the jurisdictional question and, having found jurisdiction, to proceed to the merits.

The decisions of those courts were necessary to enable the parties to invoke this Court's appellate jurisdiction. 28 U.S.C. § 1254(1)(1982). The foundation for that jurisdiction has been laid.

The fact that Act does not apply to the Justices of this Court leaves one and only one forum composed of federal judges not subject to a disqualifying interest. The issues raised affect the judges of all the federal courts over which this Court exercises its power of supervision [see, e.g., Rule 17.1(a) of this Court's Rules]. This is a case of first impression that will affect the interests of the entire federal judiciary. Those were the reasons petitioner advanced (Petition 40-44), and the Committee has declined to address them. Petitioner submits that they were and remain compelling.

b. The Committee's suggestion that, carried to their logical extreme, petitioner's arguments would require this Court to grant review in all cases between federal judges arising under the Act ignores reality. This case and Hastings v. Judicial Conference are the only cases arising under the Act that have come before the federal courts. Resolution of the issues presented here and there will finally resolve the fundamental questions that Act presents -- if, but only if, this Court resolves them. Those decisions will either make further litigation between judges unnecessary or will provide the guidance and framework necessary to permit such litigation to be conducted in an orderly and expeditious manner. Given the acrimony and notoriety this litigation has generated, that is a result this Court

should seek to achieve at the earliest feasible moment.

CONCLUSION

Petitioner has separately requested that this Court defer action on the Petition.[12] Petitioner submits, however, that when this Court does act, it should grant the Petition and issue the writ.

Respectfully submitted,

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12. See Motion Requesting that The Court Defer Consideration of the Petition and Request that the United States Respond to the Petition, Hastings v. Investigating Committee, etc., et al., No. 84-302 (U.S.).